Judge Scalley DC 16577-63

WARRANT

No. .....

DISTRICT OF COLUMBIA, ss:

To the Chief of Police of the District of Columbia, Greetings:

Whereas, it appears by oath of

.....

that .....

committed the offense as charged on the reverse side hereof,

YOU ARE THEREFORE HEREBY COMMANDED to take the said

.....

and bring him/her before the said COURT OF GENERAL SESSIONS forthwith to answer said charge.

Witness the Honorable JOHN LEWIS SMITH, JR., Chief Judge of the District of Columbia Court of General Sessions, and the seal of said Court this ..... day of ..... A.D. 19.....

WALTER F. BRAMHALL
Clerk, Court of General Sessions

By .....
Deputy Clerk

LET THIS WARRANT ISSUE

.....
Judge, Court of General Sessions

OFFICER MUST EXECUTE CEPI

Cepi: Amount Collateral Posted $ .....
Date Collateral Posted .....
Produce Collateral Posted .....
Remarks .....

OFFICER'S NAME .....

Col. ..... No. .....

At No. ..... Precinct ..... Date .....

DISTRICT OF COLUMBIA

Eddie J. Hicks

Age 25 Color W

Notified to appear in Court at .....

INFORMATION
VAGRANCY
VIOLATION OF POLICE REGULATIONS
VIOLATION ACT OF CONGRESS

WITNESSES

J. E. Thomas Officer

JUN 12 1963

Atty Timberlake Appt

Plea Not Guilty

Judgment Guilty

Cont. 6/13/63

Bond 300 CHD

JUN 13 1963
Imposition of Sentence Suspended

C.11

6-15-63 motion to set aside finding of guilty & for judgement pro, of dismissal or for new trial & for arrest of judgement. Rec'd & filed this date set for 6-20-63 R.10,

JUN 20 1963

Motion to set aside finding of Guilty & for Judgment of Dismissal & for arrest of judgment or for New Trial heard & Denied

June 29, 1963
Notice of Appeal Filed.

(FILE ENDORSEMENT OMITTED)

JUN 26 1963 Appeal fee rec'd & 16577-63 B — DCC

5.5

[fol. 6]

4

[fol. 7]

ATTACHMENT TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[File Endorsement Omitted]

UNITED STATES DISTRICT OF COLUMBIA

vs.

EDDIE J. HICKS

MOTION TO SET ASIDE FINDING OF GUILTY AND FOR JUDGMENT OF DISMISSAL, OR FOR NEW TRIAL,
AND
MOTION FOR ARREST OF JUDGMENT—filed June 15, 1963

Now comes the defendant, Eddie J. Hicks, by his counsel, Charles W. Wolfram, and moves the Court to set aside the finding of guilty herein and for judgment of dismissal of the information in accordance with defendant's motion for dismissal, or in the alternative for a new trial, or for a new trial generally, or in the alternative for arrest of judgment, on the following grounds:

(A) Motion for New Trial

(1) There was no substantial and competent evidence to sustain the finding of guilty.

(2) The defendant upon all the evidence and upon [fol. 8] the law applicable thereto under the decisions of the District of Columbia Court of Appeals, The United States Court of Appeals for the District of Columbia Circuit, the Supreme Court of the District of Columbia, and the Supreme Court of the United States, was en-

titled as a matter of law to a finding of not guilty at the conclusion of all the testimony.

(B) Motion for Arrest of Judgment

(1) The judgment should be arrested and the information dismissed or a new trial granted because Sections 22-3302(3) and 22-3302(9) of the District of Columbia Code were unconstitutionally applied to the defendant in violation of his rights, without limitation or waiver by their specification, under the Constitution of the United States, to wit:

a) the Freedom of Assembly and Freedom of Speech clauses of the First Amendment in that the sections were applied so as to deprive defendant of his rights to rest and associate in a public park with his friends and acquaintances and sing, talk and play upon musical instruments with them;

b) the Due Process clause of the Fifth Amendment in that the sections were applied so as to deprive defendant of liberty and property by means of an unreasonable discrimination solely because defendant was poor and unemployed and/or because defendant was untidy and unshaven and/or because defendant was playing a guitar and/or because defendant was associating with a member of the Negro race and/or for some other unreasonable cause or causes unknown; and, further, in that the words of the sections as used in the information did not sufficiently apprise defendant of what constituted elements of the offense alleged such as "an immoral and profligate life" so that defendant could intelligently make [fol. 9] his defense;

and c) the Cruel and Unusual Punishments clause of the Eighth Amendment in that defendant was punished under these sections for being artistic, for being poor, for being unemployed and generally for having outraged by his status and conduct an unknown and unconstitutionally severe code or moral standards.

(2) The judgment should be arrested and the information dismissed because Sections 22-3302(3) and 22-3302(9) of the District of Columbia Code under any reasonable construction are unconstitutional on their face

because they violate the following clauses, without limitation or waiver by their specification, of the Constitution of the United States, to wit:

a) the Bill of Attainder clause of Section 9 of Article I in that the sections punish as a crime the status or condition of being poor and unemployed without admitting explanation or excuse or requiring a showing by the prosecution that such poverty and unemployed was initiated and maintained willfully and with aforethought;

b) the Due Process clause of the Fifth Amendment in that the sections discriminate unreasonably against the poor and unemployed and in favor of comfortable and employed persons who may nonetheless be "immoral and profligate" with impunity; and, further, in that the sections are fatally vague and cannot be used reasonably by any person to regulate his conduct; and, further, in that the sections permit and encourage the police to enforce upon private citizens the eccentricities of their own moral standards or, under the guise or morals, to pursue and vindicate a personal dislike, distaste or hatred for particular individuals, groups or races;

and c) the Cruel and Unusual Punishments clause [fol. 10] of the Eighth Amendment in that the sections make criminal the status or condition of being poor and unemployed without regard to whether it is within the power of the condemned class of millions of persons to remove themselves from the situation which the sections proscribe.

/s/ Charles W. Wolfram
CHARLES W. WOLFRAM
Attorney for Defendant
701 Union Trust Bldg.
Washington 5, D.C.

NOTICE

To: Chester H. Gray, Esq.
Corporation Counsel

Please take notice that the foregoing motions will come on for hearing before Judge Thomas C. Scalley, of said Court, on Thursday, June 20, 1963, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, without further notice to you.

/s/ Charles W. Wolfram
Attorney for Defendant

NOTICE TO CLERK

The Clerk of said Court will please set the foregoing motions for new trial and for arrest of judgment for hearing before Judge Thomas C. Scalley, who tried said cause, on Thursday, June 20, 1963, at 10:00 o'clock A.M., or as [fol. 11] soon thereafter as counsel may be heard.

/s/ Charles W. Wolfram
Attorney for Defendant

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 12]

ATTACHMENT TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

ORDER—June 20, 1963

Motion to set aside finding of guilty and for judgment of dismissal or for arrest of judgment or for new trial heard and denied.

JUDGE SCALLEY

[fol. 13]

ATTACHMENT "B" TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[Title Omitted]

* * * *

NOTICE OF APPEAL—filed June 29, 1963

Name and address of appellant: Eddie J. Hicks, c/o 1617-15th Street, Northwest, Washington, D. C.

Name and address of appellant's attorneys: Charles W. Wolfram, Esq., and M. Michael Sharlot, Esq., 701 Union Trust Building, Washington 5, D. C.

Offense: Vagrancy (D. C. Code, Section 22-3302).

Date of judgment or order: June 20, 1963

Brief description of judgment or order: Motion in arrest of judgment denied.

Where confined, if not on bail: Released on personal recognizance.

The above-named appellant hereby appeals to the District of Columbia Court of Appeals from the judgment or order above-mentioned.

/s/ Charles W. Wolfram, Esq.

/s/ M. Michael Sharlot, Esq.
Attorneys for Appellant

[fol. 14]

* * * *

[DESIGNATION OF RECORD—filed July 5, 1963
(omitted in printing)]

[fol. 15] * * *

[fol. 16]

ATTACHMENT "C" TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[File Endorsement Omitted]

EDDIE J. HICKS, APPELLANT

vs.

UNITED STATES DISTRICT OF COLUMBIA, APPELLEE

STATEMENT OF ERRORS CLAIMED—filed July 5, 1963

Now comes appellant through his attorney Charles W. Wolfram, Esq., and states that the following is the error which appellant claims occurred in the trial court and upon which appellant intends to rely on appeal:

> That the court erred in denying appellant's motion for arrest of judgment on the grounds that the statute under which appellant was convicted is unconstitutional on its face.

/s/ Charles W. Wolfram, Esq.
Attorney for Appellant

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 17] * * *

[fol. 18]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 19]

[File Endorsement Omitted]

[fol. 20]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

[MINUTE ENTRY OF ARGUMENT—November 18, 1963 (omitted in printing)]

[fol. 21]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3340

EDDIE J. HICKS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Appeal from the District of Columbia Court of General Sessions

Argued November 18, 1963

* * *

Charles W. Wolfram, with whom *M. Michael Sharlot* was on the brief, for appellant.

Ted D. Kuemmerling, Assistant Corporation Counsel, with whom *Chester H. Gray*, Corporation Counsel, *Milton D. Korman*, Principal Assistant Corporation Counsel, and *Hubert B. Pair*, Assistant Corporation Counsel, were on the brief, for appellee.

OPINION—February 5, 1964

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

HOOD, *Chief Judge:* Our Code provides that certain classes of persons shall be deemed vagrants. One such class is:

> "Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source." Code 1961, 22-3302 (3).

Appellant was convicted of vagrancy under this classification. On this appeal no contention is made that the evidence was insufficient to bring appellant within the classi-

fication, and the record contains no recital of the factual situation upon which the arrest and conviction were based. Appellant asserts only the claim that this classification of vagrancy is unconstitutional.

In approaching the question as presented we bear in mind two propositions. First, a presumption of constitu- [fol. 22] tionality attaches to all Acts of Congress; [1] and second, a court of limited jurisdiction should not declare an Act of Congress to be unconstitutional unless its unconstitutionality is plain and manifest.[2] We also note that in at least two instances this court has held the act in question to be constitutional.[3]

The chief attack on the act is that the words "immoral or profligate life" are vague and uncertain to such a degree as to render the classification unconstitutional. Those words were defined in a general way by this court in *Davenport* v. *District of Columbia*, D.C.Mun.App., 61 A. 2d 486 (1948), and we see no occasion to repeat or elaborate upon that definition. We note, however, that, because of what Mr. Justice Frankfurter referred to as the "intrinsic difficulties of language," [4] a certain amount of imprecision is inherent wherever words are employed. The Constitution does not require impossible standards; [5] all that is required is a reasonable degree of certainty.[6] Consequently the courts, including the Supreme Court of the United States, have been reluctant to declare statutes unconstitutional merely because of a lack of preciseness

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[1] *Henderson* v. *E Street Theatre Corporation*, D. C. Mun. App., 63 A.2d 649 (1948).

[2] *United States* v. *Lewis*, D. C. Mun. App., 100 A.2d 40, aff'd 94 U.S. App. D.C. 205, 214 F.2d 853, aff'd 348 U. S. 419 (1955).

[3] *Rogers* v. *District of Columbia*, D. C. Mun. App., 31 A.2d 649 (1943); *Thomas* v. *District of Columbia*, D. C. Mun. App., 161 A.2d 52 (1960).

[4] *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 59 (1941).

[5] *United States* v. *Petrillo*, 332 U. S. 1 (1947).

[6] *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (1952).

in terms used in the statute.[7] We reject appellant's first contention.

Appellant's second contention is that the statute makes criminal the status or condition of poverty and unemployment. We do not agree. No one can be convicted under the statute simply because he is poor or unemployed. Only those who lead an immoral or profligate life are condemned by the statute; and a man of means may be convicted under the statute for leading an immoral and profligate life if his means are derived from an unlawful source, such as dope peddling or gambling.

Affirmed.

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[7] *See, e.g., Roth* v. *United States*, 354 U. S. 476 (1957) [obscene lewd, lascivous, or filthy]; *Caminetti* v. *United States*, 242 U. S. 470 (1917); and *Cleveland* v. *United States*, 329 U. S. 14 (1946) [any immoral purpose]; *Jordan* v. *De George*, 341 U. S. 223 (1951) [crime involving moral turpitude]; *In re Cregler*, 56 Cal.2d 308, 363 P.2d 305 (1961) [loiter].

[fol. 23]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

* * * *

No. 3340 January Term, 1964

EDDIE J. HICKS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

JUDGMENT—February 5, 1964

Appeal from the District of Columbia Court of General Sessions. This cause came on to be heard on the transcript of the record from the District of Columbia Court of General Sessions, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said Court, in this cause, be and the same is hereby, affirmed.

ANDREW M. HOOD,
Chief Judge.

February 5, 1964.

* * * *

[fol. 24]

[Motion for rehearing covering 12 pages filed February 15, 1964; opposition to motion for rehearing filed February 20, 1964 and order denying motion for rehearing, February 21, 1964 omitted from this print.]

[fols. 25-39] * * *

[fol. 40]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 41]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18445

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

PETITION FOR ALLOWANCE OF APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS—filed March 2, 1964

Petition is hereby made by Eddie J. Hicks, through his undersigned attorney for allowance of an appeal from the judgment of the District of Columbia Court of Appeals entered on the 21st day of February, 1964, denying petitioner's motion for rehearing of the original judgment of that Court entered on the 5th day of February, 1964, in a case entitled Eddie J. Hicks, Appellant v. United States, District of Columbia, Appellee, No. 3340 in said District of Columbia Court of Appeals in favor of the United States, District of Columbia, against said Eddie J. Hicks.

/s/ Charles W. Wolfram
701 Union Trust Building
Washington 5, D.C.
Attorney for Petitioner

[fol. 42]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,445

DCCA No. 3340

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Wilbur K. Miller, Fahy, and Danaher, Circuit Judges, in Chambers.

ORDER DENYING ALLOWANCE OF APPEAL—April 28, 1964

On consideration of petitioner's petition for the allowance of an appeal from the District of Columbia Court of Appeals, of petitioner's brief in support thereof, of respondent's brief in opposition thereto, and of the brief of the National Capital Area Civil Liberties Union as amicus curiae in support of petitioner's petition, and of petitioner's motion for leave to prosecute his appeal without prepayment of costs, it is

ORDERED by the court that petitioner's aforesaid petition and motion are hereby denied.

Per Curiam.

WKM
JAD

Dated: April 28, 1964

Circuit Judge Fahy would grant petitioner's petition.

C.F.

[fol. 44]

* * * *

[File Endorsement Omitted]

[fol. 45]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT.

On Petition for Allowance of Appeal from the District of Columbia Court of Appeals

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PETITION FOR RECONSIDERATION EN BANC OF DENIAL OF PETITION FOR ALLOWANCE OF APPEAL—filed May 2, 1964

On March 21, 1964, Petitioner filed his Petition for Allowance of Appeal from the District of Columbia Court of Appeals, seeking review of the decision of that Court in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C. Ct. App. 1964). That decision had held that the conviction of Petitioner for vagrancy under Section 22-3302(3) of the D.C. Code—which defines a vagrant as one who leads "an immoral or profligate life"—was not unconstitutional. By its Order dated April 28, 1964, two judges of a [fol. 46] three-judge panel of this Court denied that Petition,* erroneously it is submitted and in unavoidable ignorance of the procedural status of the Petition.

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* Circuit Judges Wilbur K. Miller and Danaher voted to deny the Petition. Circuit Judge Fahy would have granted it.

The Order recited that the Petition was denied upon consideration of the briefs filed in the case, including the *Brief in Opposition submitted by Respondent.* As set out in the attached affidavits, a copy of the brief in opposition was never received by either Petitioner or Amicus or their attorneys. Hence, Petitioner has never had an opportunity to reply to that brief.

As will be set out hereafter, Respondent's Brief in Opposition unquestionably required a reply in order not to be misleading. The Brief in Opposition—which was first seen by the undersigned attorney for Petitioner on the morning of April 28, 1964 (the same date upon which the Petition for Allowance of Appeal was denied)—raises for the first time a surprising new issue which attacks the very jurisdiction of this or any other Court to entertain review of Petitioner's conviction. Admittedly, as Respondent's recently discovered brief states, there can be [fol. 47] no "jurisdiction of review" in the absence of a "real, earnest and vital controversy." But that such an absence of controversy could be created by pleadings filed and acted upon without the knowledge of the other party (the reality, earnestness and vitality of whose opposition up to that point cannot be questioned) is simply unthinkable.*

Respondent's Surprise Plea to the Jurisdiction of this Court Cannot Bear Analysis

The jurisdictional argument which Respondent attempts with no little confusion to enunciate (Brf. in Opp. 2-4) actually concerns *two* separate questions, only the first of which (the contention that Petitioner is here

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* Let nothing said here be read to reflect in any way upon the unquestionable professional honor and unstinting honesty of any of the attorneys for Respondent. Ted Kuemmerling, Esq., who has ably argued and briefed this case for Respondent here and in the Court below, has personally assured the undersigned attorney for Petitioner that he recollects that his Brief in Opposition was mailed, as his Certificate of Service states, to the attorneys for both Petitioner and Amicus. That Mr. Kuemmerling has thus fully discharged his responsibility under the Rules of this Court does not admit of even the slightest doubt.

seeking an "advisory opinion") involves jurisdictional [fol. 48] considerations. The second question involves well-settled canons which guide courts in the consideration of constitutional questions. Neither matter, when analyzed clearly, precludes review of the decision of the Court below.

The objection that this Court is being asked to deliver an advisory opinion can quickly be put to one side. What Justice Brandeis was speaking of in his famous dictum regarding the avoidance of constitutional questions in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 *et seq.*, was a case where the interests of supposedly opposing parties were, in fact, substantially similar and friendly so that no "real, earnest and vital controversy" * existed over the constitutional question sought to be put in issue. Unless Respondent can be understood here to be confessing error, or lest it be supposed that Petitioner ever is willing to admit that the words "immoral or profli- [fol. 49] gate life" in a penal statute are anything but an outrage to the Constitution, let it be realized that the record clearly shows that Petitioner is attacking his conviction for vagrancy as a nullity under the Constitution and that Petitioner intends to pursue his attack until final victory or defeat. Nothing but whimsy or confession of error by the Government could support Respondent's contention.

Some of the remaining cases cited by Respondent do raise a separate question which, although misunderstood by Respondent, should be considered and disposed of so that it will no longer be thought to cast doubt upon the ripeness of the constitutional questions raised by Petitioner. Several cases, including those cited by Respondent, have stated that certain kinds of constitutional questions are best adjudicated on a full factual record. Such a case was *Lion Mfg. Corp.* v. *Kennedy*, —— App. D.C. ——, —— F.2d —— (No. 17,832—Decided March 5, 1964), where the appellant sought a declaratory judgment to

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* The quoted matter is actually from Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892). The words are quoted by Justice Brandeis, *supra* at 346.

have the entire Gambling Devices Act of 1962 (76 Stat. 1075, 15 U.S.C. §§ 1171-78 (Supp. IV, 1963), amending Slot Machine Act of 1951, 64 Stat. 1134) declared un- [fol. 50] constitutionally vague. This Court held that one could not thus foreclose future criminal prosecution where there was no showing that the complaining party was within the impingement of the statute. The complaining party there had no *standing* to attack a criminal statute whose "immediate adverse" effect he could not show. But surely such effect and such standing must exist, if ever, after one has been convicted under the statute being attacked. This entirely inapposite situation is the situation in which Petitioner presently finds himself. The other principal case relied upon by Respondent, *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963), similarly involved an attack upon Section 3 of the Robinson-Patman Act in a preliminary motion to quash an indictment. Although the corporation had already been indicted under the statute, the trial of the case had not yet commenced and there was thus the clear possibility that no conviction would result.

In both the *Lion Manufacturing* and *National Dairy* cases, the holding of the courts that the constitutional questions presented needed additional facts for proper [fol. 51] adjudication did not preclude those complaining parties from later raising those same questions at trial. The cases merely deferred full consideration of the questions by appellate courts until after trial. But Petitioner here has already been tried, and convicted. If he cannot raise his constitutional questions here, he is effectively precluded from raising them at all.

A case which Respondent does not cite, *United States* v. *Raines*, 362 U.S. 17, 21 (1960), deals more specifically with Respondent's objection, particularly its argument (Brf. in Opp.) against consideration of the admittedly hypothetical examples cited by Amicus Curiae (Brf. for Amicus 8)—and fully endorsed by Petitioner—of the unconstitutional usages to which Subsection 3 can be put. The Court in *Raines* held that one would not be heard to attack a statute on the grounds that impliedly it might apply to other persons or other situations in which its

application might be unconstitutional, but where no complaint is made that the statute is unconstitutional as to the complaining party. This holding is entirely proper [fol. 52] in cases such as *Raines* where the attack is upon the constitutionality of a statute *as applied.* But the principal argument of Petitioner in the present case is that Subsection 3's supposed proscription against "immoral or profligate" lives is *void on its face*—that even under the most strained construction of the words "immoral or profligate" there can be no valid conviction had under it. This argument does not need hypothetical support as did the argument by the defendants in *Raines.* Subsection 3 is unconstitutional, not merely as applied to certain persons or in certain limited situations—it is unconstitutional as to all persons and in all conceivable situations. The complete answer to Respondent's objection is given by *Smith* v. *California,* 361 U.S. 147, 151 (1959):

> ". . . It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. . . ."

[fol. 53] Rare indeed is he who can claim more scrupulous care in the application of theories of judicial restraint than was Mr. Justice Frankfurter, especially in the matter of avoiding constitutional questions. Yet even Justice Frankfurter has been moved to state without the invocation of any particular state of facts that broadly written vagrancy statutes such as that involved here are unquestionably void because of their vagueness. *Winters* v. *New York,* 333 U.S. 507, 540 (1948) (dissenting opinion). That Justice Frankfurter is certainly not alone in his judgment is clear from the cases cited, among many, by Petitioner in his Brief in Support of the Petition.

In short, Petitioner's claim that his conviction was unlawful because it was obtained under a statute void on its

face would be fully justiciable and ripe for consideration by this Court if his Petition for Allowance of Appeal were granted. Respondent's arguments to the contrary—while they might have merit if the claim were that the statute was unconstitutional only as specifically applied to Petitioner—are without foundation when considered in light of the actual posture of the constitutional questions presented.

[fol. 54] Therefore, Petitioner requests that the Order of April 27, 1964, denying his Petition for Allowance of Appeal be set aside and that the Petition and the Motion for Leave to Appeal Without Prepayment of Fees and Costs be granted.

Respectfully submitted,

/s/ Charles W. Wolfram, Esq.
701 Union Trust Building
Washington, D. C.

Attorney for Petitioner

[fol. 55]

* * * * *

AFFIDAVIT OF CHARLES W. WOLFRAM

CHARLES W. WOLFRAM, Esq., first being duly sworn, says:

I am a resident and citizen of the District of Columbia and a member of the bar of this Court. My office is at 701 Union Trust Building, Washington, D. C., in the law offices of Covington & Burling, with which firm I am

associated. I am now, and have been since June 14, 1963, retained by Eddie J. Hicks to prosecute appellate review of his conviction on June 13, 1963 of the crime of vagrancy in the District of Columbia Court of General [fol. 56] Sessions, Criminal Division. This affidavit is made in connection with the Petition for Reconsideration En Banc of Denial of Petition for Allowance of Appeal.

As the records in the above-entitled case will show, a Petition for Allowance of Appeal and Brief in Support Thereof on behalf of Eddie J. Hicks was filed by me as Mr. Hicks' attorney on March 21, 1964. The purpose of the Petition is to obtain review in this Court of the decision of the District of Columbia Court of Appeals in *Hicks* v. *District of Columbia, United States*, 197 A.2d 154 (D.C. Ct. App. 1964) holding that Subsection 3 of the vagrancy statute (D.C. Code § 22-3302(3)) was not unconstitutionally vague or discriminatory.

On the afternoon of Friday, April 24, 1964, I received a letter from a friend congratulating me upon having successfully persuaded the United States Court of Appeals to hear the *Hicks* case on its merits. (It subsequently was determined that the author of the letter had misunderstood the import of the Order dated April 8, 1964 of Chief Judge Bazelon, granting the motion of the National Capital Area Civil Liberties Union to file a Brief in Support of the Petition for Allowance of Appeal [fol. 57] as Amicus Curiae and that this misunderstanding prompted his letter.) Being unaware that this Court had acted on the Petition, I called the office of the Motions Clerk on the telephone and spoke to an assistant in that office who informed me that, in fact, the Petition for Allowance of Appeal had been acted on just that morning, but that the Petition had been denied. In light of the letter to the contrary which I had just received, I asked the assistant clerk to read me the text of the Order. When the assistant clerk read the portion of the Order which stated that the Order of denial was entered upon consideration ". . . of respondent's brief in opposition . . .," I then learned for the first time and to my complete surprise that Respondent had in fact filed a Brief in Opposi-

tion to the Petition. Before that time I was not aware of the existence of such a brief and had not received or seen a copy of such brief and, of course, had not filed a Reply to such brief.

I immediately questioned closely every person in the firm of Covington & Burling who in the ordinary course of the firm's operations would have any dealings with in- [fol. 58] coming mail. Each of these persons stated to me personally that no undelivered mail was in the office and that they did not recall having received within the past few weeks any communication addressed to me from the Office of the Corporation Counsel or having delivered such to me. I am satisfied that the Government's Brief in Opposition was not delivered to this office.

The first opportunity I had to speak to Ted D. Kuemmerling, Esq., the Assistant Corporation Counsel in charge of the *Hicks* case for Respondent, was the morning of the following Monday, April 27, 1964. Mr. Kuemmerling told me over the telephone that he had indeed filed a Brief in Opposition for Respondent and had entrusted copies to his secretary to be mailed to myself and to Lawrence Speiser, Esq., Counsel for Amicus Curiae. Mr. Kuemmerling questioned his secretary about the matter and told me that she had stated that she recalled having mailed the briefs on March 31, 1964. This is the date upon which the Brief in Opposition was filed.

I regard Mr. Kuemmerling as a trusted fellow attorney and acquaintance and do not question his statements in any regard. I consider that on March 31, 1964, Mr. [fol. 59] Kuemmerling fully and fairly fulfilled his obligation under Rules 6 and 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals, by mailing a copy of his brief to me. I can only surmise that the brief was lost in the mails sometime after it left the hands of Mr. Kuemmerling's secretary and before it arrived at the offices of Covington & Burling.

The first occasion I had to see a copy of the Brief in Opposition was on the morning of Tuesday, April 28,

1964, when I received a copy which Mr. Kuemmerling had mailed to me after our telephone conversation of the previous day.

/s/ Charles W. Wolfram, Esq.

Subscribed and sworn to before
me this 1st day of May, 1964.

Mary Louise Werres
Notary Public

My commission expires: 11/14/66 (SEAL)

[fol. 60]

* * * *

AFFIDAVIT OF JULIE N. BARROWS

JULIE N. NARROWS, first being duly sworn, says:

I am a resident and citizen of the District of Columbia. I am the Executive Assistant Director of the Washington Office of the American Civil Liberties Union and Lawrence Speiser, Esq., is the Director of the Washington Office. Our offices are at Suite 803, 1101 Vermont Avenue, N.W., Washington, D. C.

I am generally familiar with the above-entitled case having followed the case in the newspapers and through communications with Mr. Speiser and Charles W. [fol. 61] Wolfram, Esq., a member of the National Capital Area Civil Liberties Union, who, I understand, was retained by Eddie J. Hicks to prosecute an appeal from a conviction for vagrancy on June 13, 1963. I understand

that this affidavit is to be filed with a Petition for Reconsideration En Banc to be filed by Mr. Wolfram on behalf of Mr. Hicks.

On April 2, 1964, Mr. Speiser entered his appearance in the above-entitled case and filed a Brief in Support of the Petition for Allowance of Appeal filed by Mr. Wolfram on behalf of Mr. Hicks.

Mr. Speiser will be out of the city until Tuesday, May 5, 1964, and thus will be unable to execute an affidavit. I have spoken to Mr. Speiser, however, and, on the basis of my own personal knowledge and this conversation, I know that the first occasion that Mr. Speiser or myself became aware that a Brief in Opposition had been filed by Respondent in the above-entitled case was on the morning of Monday, April 27, 1964, when we were informed by Mr. Wolfram that such a brief had been filed. I have responsibility for Mr. Speiser's mail and I have ques-
[fol. 62] tioned each and every person in our office who would have anything to do with matter mailed to Mr. Speiser. They are all certain, as I am, that such Brief in Opposition had not been received in our offices prior to the time on Monday, April 27, 1964, when we first learned of the existence of such brief.

/s/ Julie N. Barrows
JULIE N. BARROWS

Subscribed and sworn to before
me this 1st day of May, 1964.

/s/ Frank F. Brown
Notary Public

My Commission Expires June 14, 1967 (SEAL)

[fol. 63]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 64]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR RECONSIDERATION
EN BANC—June 15, 1964

On consideration of petitioner's petition for reconsideration *en banc* of the denial of his petition for the allowance of an appeal from the District of Columbia Court of Appeals, it is

ORDERED by the court *en banc* that petitioner's aforesaid petition is hereby denied.

Per Curiam

Dated: June 15, 1964

Chief Judge Bazelon would grant petitioner's petition for reconsideration *en banc* and reserves the right to file a statement of his views at a later date.
Circuit Judges Fahy and Wright would grant petitioner's petition for reconsideration *en banc.*

McGOWAN, *Circuit Judge, concurs* in the foregoing order denying petitioner's petition for reconsideration

en banc: This petition to review *en banc* an order of this court denying leave to appeal from the decision in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C. Ct. App. 1964), presents substantial constitutional questions. The resolution of these questions is urged, however, on the basis of a record which is wholly unrevealing in factual terms. When the issue is, as here, whether to exercise our discretion to bring a case here for review, the absence of such a record is for me at any rate a significant consideration. See *Hamilton* v. *Pepsi-Cola Bottling Co.*, 102 U.S. App. D.C. 256, 252 F.2d 637 (1958).

I therefore vote to deny the petition for rehearing *en banc*.

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Case No. 18,445

RECEIVED
Sep 1, 1964
Clerk of the United
States Court of Appeals

United States Court of Appeals
for the District of Columbia Circuit
FILED Oct 26, 1964
/s/ Nathan J. Paulson
Clerk

[Title Omitted]

MOTION OF PETITIONER TO VACATE AND REENTER ORDER

Petitioner (petitioner-movant herein), through his undersigned attorney, respectfully moves the Court to vacate and reenter contemporaneously with the granting of this motion the order entered in the above-entitled cause on June 15, 1964. That order denied petitioner-movant's petition for reconsideration *en banc* of the denial of his petition for the allowance of an appeal from the judgment of the District of Columbia Court of Appeals in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D. C. Ct. App. 1964).

The necessity for this motion arises from the neglect of the undersigned attorney for petitioner-movant to observe the special time limitations governing petitions to the Supreme Court of the United States for writs of cer-

[fol. 66] tiorari in criminal cases arising from United States Courts of Appeals. Proceeding on the erroneous assumption that the general 90-day limitation for filing such petitions applied to the instant case, the undersigned attorney for petitioner-movant failed to prepare and file a petition for certiorari within the special 30-day limitation period provided, in Rule 22(2) of the Supreme Court Rules, for petitions for writs of certiorari to the courts of appeals in criminal cases.

The petition for certiorari which petitioner-movant desires to file would be meritorious and should be considered by the Supreme Court. It is respectfully submitted that the neglect of the undersigned attorney for petitioner-movant was excusable within the meaning of Rule 22(b) of the Rules of this Court governing appeals from the District of Columbia Court of Appeals and should not be permitted to preclude review by the Supreme Court since it is within the discretionary power of this Court to cure this procedural defect. The undersigned attorney for petitioner-movant has been engaged in the practice of law for two years and has never before handled a criminal matter in any court, being engaged generally in the practice of civil corporate law. The aforementioned Rule 22 (b) provides for the enlargement of time, in the discretion of the Court, where the failure to act was due to excusable neglect. While the present motion perhaps does [fol. 67] not come within the specific wording of Rule 22 (b), it certainly comports with its intent and, it is submitted, the circumstances demonstrate excusable neglect. There is, of course, no question that the granting of the present motion would interfere in any way with the jurisdiction of the Supreme Court. Obviously, since the Supreme Court has not yet been approached, its jurisdiction has not yet attached to this cause and it still lies within the discretionary power of this Court to grant the relief requested.

In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22(2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order contemporaneously with the granting of this motion.

Since the imposition of sentences upon petitioner-movant was indefinitely suspended in the trial court and since petitioner-movant was released upon his personal recognizance or bond, the granting of this motion would not adversely affect the substantive rights of any party.

Respectfully submitted,

/s/ Charles W. Wolfram, Esq.
Attorney for Petitioner-Movant
701 Union Trust Building
Washington, D. C. 20005

[fol. 68]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 69]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

September Term, 1964 DCCA # 3340

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Bazelon, Chief Judge, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER VACATING AND REENTERING ORDER DENYING PETITION FOR RECONSIDERATION EN BANC
—October 26, 1964

On consideration of petitioner's motion for leave to file motion to vacate and re-enter order, of respondent's opposition thereto, and of petitioner's reply, and it appearing that petitioner's motion to vacate and re-enter order has been lodged with the clerk, it is

ORDERED by the court *en banc* that petitioner's aforesaid motion for leave to file motion to vacate and re-enter order be granted, and the Clerk is directed to file petitioner's motion to vacate and re-enter order, and upon consideration whereof, it is

FURTHER ORDERED by the court *en banc* that petitioner's motion to vacate and re-enter order be granted, and the order entered herein on June 15, 1964, is vacated, and it is

FURTHER ORDERED by the court *en banc* that petitioner's petition for reconsideration *en banc* of the denial of his petition for allowance of an appeal from a judgment of the District of Columbia Court of Appeals is denied.

Per Curiam.

Dated: Oct 26, 1964

Chief Judge Bazelon would grant the petition for reconsideration *en banc* and reserves the right to file a statement of his views at a later date.
Circuit Judge Fahy would grant the petition for reconsideration *en banc*, with conditions limiting time to apply for certiorari.
[fol. 70] Circuit Judge Wright would grant the petition for reconsideration *en banc*.

McGOWAN, *Circuit Judge, concurs* in the foregoing order denying petitioner's petition for reconsideration *en banc*: This petition to review *en banc* an order of this court denying leave to appeal from the decision in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C.Ct.App. 1964), presents substantial constitutional questions. The resolution of these questions is urged, however, on the basis of a record which is wholly unrevealing in factual terms. When the issue is, as here, whether to exercise our discretion to bring a case here for review, the absence of such a record is for me at any rate a significant consideration. See *Hamilton* v. *Pepsi-Cola Bottling Co.*, 102 U.S.App.D.C., 256, 252 F.2d 637 (1958).

I therefore vote to deny the petition for rehearing *en banc*.
Senior Circuit Judge Wilbur K. Miller, prior to his retirement on October 15, 1964, voted to deny the petition for reconsideration *en banc*.

[fol. 71]

* * * *

[DESIGNATION OF RECORD—filed November 24, 1964 (omitted in printing)]

[fols. 72-73] * * *

[fol. 74]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 711 Misc., October Term, 1964

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA

On Petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 1, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 867.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 1, 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 787473 678